No. 71-850

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

UNITED STATES OF AMERICA,

Petitioner,

vs.

IN RE SEPTEMBER 1971 GRAND JURY, RICHARD J. MARA, a/k/a RICHARD J. MARASOVICH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF OF WITNESS-RESPONDENT RICHARD J. MARA

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MIDWEST LAW PRINTING CO., CHICAGO 60601, FINANCIAL 6-3060

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QUESTIONS PRESENTED.

1. Whether the Government can compel a witness, by incarceration pursuant to the use of a Grand Jury subpoena, to submit handwriting and printing exemplars, to the Government and force compulsion, based upon an FBI Affidavit submitted *in camera* to a district Court without allowing a witness or counsel to see said affidavit, where the information contained in the affidavit did not emanate from any independent activity before that body.
2. Whether the Fourth and Fifth Amendments forbid such an abuse of the Grand Jury process.

STATEMENT.

The witness was subpoenaed before the September, 1971, Grand Jury. It was not a Special Grand Jury. On September 23, 1971, he appeared pursuant to that subpoena and was directed by the U.S. Attorney to give exemplars to an F.B.I. Agent. He refused and was told to return again on September 28, 1971. On that date he again was directed by the Assistant United States Attorney to give exemplars to an F.B.I. Agent. Again he refused and the Assistant U.S. Attorney directed the foreman of the Grand Jury to instruct the witness to give exemplars to the F.B.I. Agent. The Assistant U.S. Attorney did the directing, not the Grand Jury. No offer was made to the witness to have counsel present should he give exemplars. The Petition seeking compulsion sought the exemplars that the Grand Jury "deems necessary." It did not mention prior exhibits before the Grand Jury or that it had received other exhibits stating only that the witness was a potential defendant and that the exemplars would be used solely as a standard of comparison as to whether the witness is the author of certain writings. The government further represented that for reasons set forth in Affidavits submitted to the Court in camera, the exemplars sought "do not constitute an unreasonable search and seizure under the Fourth Amendment standards. See *In Re Dionisio*, 442 F. 2nd 276, 80 (7 Cir. 1971)".

Appeal was taken pursuant to Title 28 United States Code, Section 1826 and bond was granted pending the appeal. In answer to witness' emergency motion for bond in the 7th Circuit, the government admitted that the Af-

fidavit contains matters based upon suspicion concerning the witness' actions.

The Court of Appeals in a 3-0 decision reversed. In holding that compelling a witness to furnish exemplars is forbidden by the Fourth Amendment unless the government complies with its reasonable requirement, the Court specifically held that the government, in order to justify the reasonableness of a request to furnish exemplars, must show it by presenting its affidavit in open court in order that the witness may contest its sufficiency. "More important, unlike the warrant situation where the accused will have an opportunity to contest the sufficiency of the warrant on a motion to suppress before he may be tried and imprisoned . . ., here failure to allow the witness effectively to oppose the government's petition has resulted in an indefinite incarceration for an unchallengable reason. We cannot condone such manifest unfairness." (id at 13). The Court found that the affidavit did not result from any work before the Grand Jury or independent activity by that body and that it was an abuse of the Grand Jury for the government to impose on that body investigative work properly the function of investigative agencies; therefore the Government must show that exemplars cannot be obtained from other sources without Grand Jury compulsion.

It was a further abuse of the Grand Jury to conduct a fishing expedition under Grand Jury sponsorship with the mere explanation that a witness is a potential defendant. To insure a sufficiently explicit connection between the identification evidence sought and the purpose to be served, a more detailed affidavit must be submitted. The incarceration was unjustified and the contempt order was reversed.

ARGUMENT.

I.

INTRODUCTION.

The central questions in this case are whether the Government, by the abuse of a grand jury, compel a person to give handwriting or printing exemplars to that grand jury in violation of the Fourth Amendment based upon an FBI affidavit which showed informtion, independent of the Grand Jury and which affidavit the government and district court refused to allow the witness to see. Subsidiary, but more important is the jailing of that person without allowing him to see the affidavit to contest it violating the due process clause of the Fifth Amendment. Additionally, whether the exemplars sought were testimonial bringing the self incrimination clause of the Fifth Amendment into play. All of the foregoing dovetail into an abuse of the grand jury process where that body is used to accomplish the foregoing.

For the government to state that what was sought in this case, was solely for identification is to beg the question. This court's holdings in *Gilbert* v. *California*, 388 U.S. 263, did not make clear that the taking of handwriting exemplars does not violate the privilege of self incrimination under the Fifth Amendment in every case. For as this court stated in *Gilbert* (388 U.S. at 266), "A mere handwriting exemplar, in contrast to the *content* of what is written, like the voice or body itself, is an identifying physical characteristic outside its pro-

tection." (emphasis supplied). That is one of the issues here. The government says what is sought is for identification but this witness has never known what he was to give. If content is what the Government sought, that very essential to prove its case, especially where the action of the government is solely based on suspicion, then the Fifth Amendment applies for it discloses the very knowledge that the witness has. In *Gilbert,* no claim was made, as was made here, that the content of the exemplars was testimonial or communicative in matter.

Neither did *United States* v. *Wade,* 388 U.S. 218, make clear, what the government claims it did. *Wade* only said that it reaffirmed that the privilege against self-incrimination "protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature, 388 U.S. at 221; "It is compulsion of the accused to exhibit his physical characteristic, not compulsion to disclose any knowledge he might have." 388 U.S. at 222. "Moreover, it deserves emphasis that this case presents no question of the admissibility in evidence of anything Wade said or did at the line up which implicates his privilege." 388 U.S. 223. *Gilbert* and *Wade* do not lay to rest the claim that testimonial or communicative exemplars inplicate the Fifth Amendment. The contrary view seems evident if the exemplars sought are communicative.

Kirby v. *Illinois* ..... U.S. ....., 32 L. Ed. 2d 411, only confirmed the language used in *Schmerber* v. *California,* 384 U.S. 757, that the self-incrimination privilege protects a person from providing the state with evidence of a testimonial or communicative nature. Thusly, here the Fifth Amendment does come into play.

The cases cited by the Government in footnote 9 of its brief are inapposite here. None involved the factual situation here nor have raised the issue here. For if what is sought is selectively germane to the government case, i.e., the content and not the exemplars, the privilege should apply. No dispute would arise if a witness was asked if he signed a document and he invoked the privilege. There should be no reason in logic why the privilege should not apply where a witness is asked to sign a document where content is sought. *United States* v. *Green,* 282 F. Supp. 373, *United States* v. *Irwin,* 322 F. Supp. 701; *United States* v. *Doe,* 405 F. 2nd 436, wherein the Court noted that the *Gilbert* decision did not say what the exemplars there were.

So too, is note 10 inapposite in that while Wigmore did make his observation, he further stated that the *Boyd* dicta has shown inexplicable tenacity in the decisions of this court and of other courts.

Hill v. *Philpott,* 445 F. 2nd 144, and cases cited therein have recanted and laid to rest the Wigmore theory in Section 2264. There the government, by search warrant seized private books and papers. That procedure, the government contended, obviated the Fifth Amendment leaving only the question of the Fourth Amendment. The appellate court rejected the argument, relying on *Boyd* v. *United States,* 116 U.S. 616. It recognized the intertwining of both amendments, cast aside Wigmore and held that whether evidence is testimonial or communicative in nature is the first step in the process in determining whether it may be privileged. The Fourth Amendment question was not reached. The government's premise here is wrong as to the issue involved; as has been

shown above, *Gilbert* and *Wade* do not stand for testimonial or communicative evidence being compelled in violation of the Fifth Amendment privilege of self-incrimination. It is therefore, an issue here and Fifth Amendment considerations as to self-incrimination are involved here.

II.

THE FOURTH AMENDMENT.

The Fourth Amendment guarantees against all unreasonable searches and no warrants shall issue except upon probable cause. No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restrains or interference of others; unless by clear and unquestionable authority of law. *Terry* v. *Ohio,* 392 U.S. at 9.

Here, in its Petition for compulsion, the government stated that the exemplars sought were for comparison, to determine whether the witness authored writings. It admits that what it seeks, it bases on suspicion. It does not have enough probable cause and so it uses a Grand Jury Subpoena. Compulsion is sought, upon refusal, on the basis of an FBI affidavit never disclosed to the witness. The rationale *Davis* v. *Mississippi,* 394 U.S. 721, is applicable here. There, fingerprints were involved. In turning aside the State's argument that detention occurred during an investigatory rather than accusatory stage and did not require probable cause; this court said at 394 U.S. at 726, 727, "But to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would

subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrustions be termed 'arrests' or 'investigatory detentions.' We made this explicit only last Term in *Terry* v. *Ohio*, 392 U.S. 1, 19, 20 L. Ed. 2d 889, 904, 88 S. Ct. 1868 (1968), when we rejected 'the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search."' (3, 4) Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment." *Davis* does not distinguish between Grand Jury or police actions but directed its teachings to the Fourth Amendment and what that amendment prevented Government from doing. There is no difference between a grand jury subpoena in this context and police investigation. The affidavit in this case, as found by the Seventh Circuit Court of Appeals, does not appear to contain information elicited from complainants and witnesses before the Grand Jury. The government bases its argument on the blanket assertion that the exemplars here sought are physical characteristics.

There should be no distinction between books, papers, records, handwriting or fingerprinting. Whether the argument is made on probable cause or unreasonableness, the Fourth Amendment applies. The Fourth Amendment in part, calls for probable cause. Assuming the Government's position, that the exemplars are non testimonial, the Fourth Amendment requirements for probable cause

must be met. What is attempted here is the issuance of a subpoena by a prosecutor to subvert the Fourth Amendment where a showing of probable cause is the very minimum for justifying the invasion of one's privacy. That minimum was not shown and no warrant was ever issued. The government seeks the exemplars because probable cause did not exist and can find no other method than a Grand Jury subpoena. To say that compelling a witness to give exemplars might dissipate the suspicion is to deal in fantasies. It is more logical to say that getting exemplars elsewhere is more reasonable in that the witness would have no reason to fake an exemplar already given.

What is unreasonable here is that the government seeks to elevate to facts, its suspicion of who authored writings by the issuance of a Grand Jury subpoena. Suspicion is its sole criterion. The Government in its answer to witness' emergency motion in the 7th Circuit admits that the Affidavit contains matter based upon suspicion concerning the witness' actions. This is the very thing that the Fourth Amendment prohibits as to unreasonable searches and seizures.

The government relies on an Affidavit submitted in camera to the Court below to justify its taking exemplars. It says because of the Affidavit, the taking of exemplars is reasonable and such tactic does not violate the Fourth Amendment. A general subpoena for the production of books and records may constitute an unreasonable search and seizure and is equally indefensible as a search warrant would be if couched in similar terms.

It must again be noted that this witness has not been indicted, but is solely a witness responding to a Grand Jury subpoena. If the government means that the Affidavit is sufficient for probable cause, then a warrant should issue or the Grand Jury would have indicted if it was sure that the information in the Affidavit was sufficient to indict. Neither occurred so that probable cause was not shown and as such the Affidavit is not sufficient under the Fourth Amendment. But the Government states that probable cause is not pertinent here and attempts to hide behind the veil of a Grand Jury Subpoena. Nowhere has the Government indicated why the seizure it attempts to make is reasonable. It states it relies on an affidavit yet states that probable cause is not the issue. It separates probable cause from unreasonableness and then relies on an affidavit which would in ordinary circumstances be part of probable cause. It says there is no probable cause therefore the affidavit makes the search and seizure reasonable. In the context as presented the Grand Jury may not use its subpoena powers to effect a seizure which is otherwise violative of the Fourth Amendment. Since the Government has admitted its suspicions of the witness and does not know who authored the writings, it ought not be able to compel production of evidence without showing more than it has.

Furthermore, if the Government states that the Affidavit contains probable cause, this would violate the witness' due process right under the Fifth Amendment. This Affidavit has never been seen by the witness nor his counsel. No opportunity has been afforded him the right to contest the validity and legality of the affidavit.

U. S. v. *Suarz,* 380 F. 2nd 713; *U. S.* v. *Gillette,* 383 F. 2nd 843; *U.S.* v. *Roth,* 391 F. 2nd 507; *Rugendorf* v. *United States,* 376 U.S. 528; *Aguilar* v. *Texas,* 378 U.S. 108 and *Spinelli* v. *U. S.,* 393 U.S. 410. Rule 41 of the Federal Rules of Criminal Procedure detail the requisites for the issuing of a search warrant. Rule 41 (c) states that an aggrieved person may move against the warrant, if among other things "(4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or . . ." See *Henry* v. *Unitel States,* 361 U.S. 98.

Here this witness operates in a vacuum. The Government by submitting an affidavit in camera says the giving of exemplars is reasonable by that very fact. Yet, the witness cannot attack the validity of the Affidavit as it is impounded. This violates the very concept of due process; i.e. that is to incarcerate a man based on something he cannot see or question. It also violates his right under the Fourth Amendment and the cases and rules above cited. Thus, the Government says the Affidavit makes the giving of exemplars reasonable and yet seems to make an argument for probable cause based on an affidavit the witness has a right to attack. The Government wants it both ways. If there is no probable cause then the search and seizure must be reasonable because it is based on an affidavit which the witness has never seen. This is so patent a device to seek information from a witness in violation of his Fourth and Fifth Amendment rights that it should not be countenanced by this Court. It is the duty of courts to be watchful of the constitutional rights of the citizen and against devious and stealthy encroachment on those rights.

Furthermore, it is not reasonable nor adequate to sustain the position taken by the Government. (See *U. S.* v. *Praigg*, 336 F. Supp. 480; *In the matter of Grand Jury; Ricciarde, witness*, 337 F. Supp. 253; *U. S.* v. *Bailey*, 327 F. Supp. 802; *U. S.* v. *Harris*, 453 F. 2nd 317.)

No issue was raised in *United States* v. *Doe*, 452 F. 2nd 895 as to the content of the exemplars sought; that Court sought to distinguish between compulsion by a Grand Jury subpoena and detention by law enforcement officers, and said that while the content of the communication is entitled to the Fourth Amendment protection, the underlying identification character are open for all to see, but that in any event, the Grand Jury will act an a protective buffer between the accused and the prosecutor. It arrived at the conclusion that a handwriting exemplar has already been exposed to the public at large. The opinion is in exercise of solipcism. Factually, the case is different and it does not sustain the Government's position in the instant law suit.

III.

THE GRAND JURY.

To sustain its position in this matter, the government relies on the secrecy of Grand Jury proceedings. The Grand Jury system stems from the Fifth Amendment which does not define it. It is supposed to possess an independence which is unique, "Its authority is derived from none of the three basic divisions of our government, but rather from the People themselves." *In re April 1956 Term Grand Jury*, 239 F. 2nd 263. No one quarrels with the cases cited by the government. But those cases show that while a person may be under a duty to appear be-

fore a grand jury, his rights under the Constitution may not be abrogated. An overly broad subpoena violates the Fourth Amendment, *Hales* v. *Henkel,* 201 U.S. 43. Private books and papers are not subject to subpoena in violation of the Fourteenth and Fifth Amendments. *Boyd* v. *United States,* 116 U.S. 616.

Calling a person before a grand jury is as much a seizure as is police detention. He is as detained before a grand jury as if held by the police. If a person does not respond to a grand jury subpoena, you would see police detention in its rankest form.

Here, the witness questions the abuse of the Grand Jury process by the government in the light of the facts of this case. The disclosure sought was not of the Grand Jury's investigation, but solely that of the government. More importantly and crucially, the United States Attorney is directing the witness what to do. The exemplars sought were directed to the FBI, not the Grand Jury. The Grand Jury system is increasingly coming under attack today where it is accused of being, and justifiably so, a rubber stamp for government action. The government would make the grand jury a temple where no transgressions are ever committed on its holy ground. Being holy, no one may question its wisdom within its walls.

On July 27, 1972, Judge William J. Campbell, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, made a Report to the Members of the Conference of Metropolitan Chief District Judges of the Federal Judicial Center. Judge Campbell has tried more cases than any other Judge in

the Federal System. He was a judge for some 32 years. In his statement to the Conference with reference to eliminating the Grand Jury, he said:

> Much of the bad procedural law which clutters the administration of criminal justice today is due to deserved Supreme Court displeasure over the anachronism of the Grand Jury and its offspring—the criminal indictment. This great institution of the past has long ceased to be the guardian of the people for which purpose it was created at Runnymede. Today it is but a convenient tool for the prosecutor —too often used solely for publicity. Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury.
>
> I favor abolishing the grand jury and making each prosecutor responsible by statute for the prosecutions in his district, including civil responsibility for bad faith or malicious prosecution. A preliminary hearing before a magistrate to determine probable cause with the accused participating through counsel would be a great improvement over the present archaic indictment. Many of the states and indeed our own military now successfully use such a system.

IV.

THE PRELIMINARY HEARING MUST BE OPEN AND ADVERSARY.

Issue is made of the Court's ruling below that a preliminary showing of reasonableness should be required by the Government before the obtaining of an exemplar, and hides behind the sanctity of a Grand Jury. Issue has already been made as to that body to function as an independent process standing between the accused and the accuser. This case is ample evidence that it

does not. To follow the Government's argument to its logical conclusion, because it is a Grand Jury process, a witness must forego any and all rights which he may have when he appears before a Grand Jury. There is no doubt that the Government would want to accomplish this, but the Fourth and Fifth Amendments must be complied with. Further, the Government would go one step further and would want the hearing to be an ex parte in camera proceeding. That type of proceeding does not square with the requirements of the Fourth Amendment, in that that Amendment does not allow for half way measures. There should be no reason why a witness may not contest the preliminary hearing as he would in other cases under the Fourth Amendment. The Fourth Amendment does not call for any secretive proceedings, the result of which would incarcerate an individual without compliance to the probable cause, reasonableness and the looking at the Affidavits issued thereunder. There should be no reason why the Government should be allowed to use this type of procedure where it cannot do so in a proceeding involving search or arrest warrants.

The method sought is ingenious but then government has always been ingenious in circumventing and limiting the rights of people. *Hill* v. *Philpot,* 445 F. 2nd 144, *United States* v. *Bailey,* 327 F. Supp. 802, *In Re Dionisio,* 442 F. 2nd 276, and this case are examples of the extremes the government will go to obtain a result. Only in the instant case have they gone so far as to put a man in jail on the basis of an FBI affidavit, he has never seen, and which has consistently been refused him.

CONCLUSION.

For the reasons stated, the judgment of the Court of Appeals in this case, reversing the contempt orders of the District Court, should be sustained.

Respectfully submitted,

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